BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22,393

GREAT FALLS COMMUNITY TV CABLE CO., INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents,

HARRISCOPE BROADCASTING CORPORATION,

SNYDER & ASSOCIATES,

TELEPROMPTER TRANSMISSION OF KANSAS, INC.,

Intervenors.

ON PETITION FOR REVIEW OF A MEMORANDUM OPINION AND
ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

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BRIEF FOR RESPONDENTS

COUNTERSTATEMENT OF THE CASE

Petitioner, Great Falls Community Cable Company, Inc., operates a CATV system in Great Falls, Montana, using the services of microwave common carriers licensed by the Federal Communications Commission to import distant signals into its community. Before the Commission Great Falls sought a partial waiver of rules and regulations which require the licensed carriers and petitioner's CATV system not to import distant signals which duplicate programs to be carried by the local television stations in Great Falls

during the same day. When the Commission denied the waiver (R. 60-84), it sought review in this Court pursuant to Section 402(a) of the Communications Act, 47 U.S.C. 402(a).

The basic facts are undisputed: Great Falls operates a CATV system in Great Falls, Montana. A CATV system receives and amplifies signals of distant television stations and distributes them by cable to homes of individual subscribers who pay a monthly fee. Petitioner receives its distant signals by means of microwave facilities licensed by the Commission. This permits Great Falls to import into its community six distant signals; one from Canada, two from Salt Lake City, Utah, and three from Spokane, Washington. Great Falls, Montana, has two local television stations of its own, KFBB-TV and KRTV. These, too, are carried on petitioner's system.

Section 74.1103 of the Commission's rules, 47 CFR 74.1103 (1967 Supp.), requires that the CATV system refrain from duplicating on the same day any program broadcast by the two local television stations. In other words, where a program is to be carried by both a distant station and a local station, the rule simply requires that the CATV system give preference to the local station's programs. The community itself would continue to receive <u>all</u> the programs carried by the system, but in some instances a choice of viewing times would be eliminated. A

similar rule, 47 CFR §21.712, applies to the licensed microwave common carriers, which the system uses to import the distant signals. The carrier, TelePrompTer Transmission of Kansas, Inc., is affiliated with the CATV system.

In its pleadings before the Commission, petitioner and its affiliated carrier asked for a partial waiver of the non-duplication rule. After considering all of the pleadings, including objections by the local television stations, the Commission denied the request. It observed that the arguments in support of a waiver "center around viewing time alternatives and CATV service disruption, and were specifically dealt with in the Second Report and Order. Same-day program exclusivity is designed in part to deal with the very situation which petitioner would have us maintain, i.e., CATV importation of programs from an adjoining time zone which duplicate local stations' network programs an hour or two after they are presented locally." (R. 68) 1/

1/ Petitioner asserts before this Court that enforcement of the non-duplication order will "eliminate about 60 percent of the service" of its system. This assertion is inaccurate, misleading, and simply not in accordance with the record facts, i.e., petitioner's showing before the agency (R. 11-17). Thus, petitioner's own showing establishes that on Sunday, February 13, the day offered as an example of the impact the rule would have on its system (R. 40) petitioner would have to delete 23 program hours (R. 11) out of a total programming schedule of some 107 hours (R. 11, 17). But this is less than 25% of all the programs carried on petitioner's system on Sunday. The 60% figure apparently applies to a limited 2 hour segment from 8:00 to 10:00 P.M. (R. 40), during which time it would have to delete network programs like "Bonanza" and "Ed Sullivan." But these programs would still be available on the system as broadcast by the local stations. (R. 11).

In its pleadings before the Commission Great Falls and its affiliate did not challenge the validity of the Commission's CATV rules, or its jurisdiction to regulate CATV. (See R. 2-26, 37-43). Since its appeal brings these questions into issue, it would be useful, we believe, to set forth briefly the principal considerations which led to the adoption of the non-duplication rule.

In the First Report and Order, 38 F.C.C. 683, the Commission observed that the national television system is based upon the distribution of programs to the public through a multiplicity of local station outlets, and that this policy had been recently reaffirmed by the Congress (38 F.C.C. 697, pars. 40-47) CATV, while useful as an auxiliary service, must have a complementary role to the television broadcast station for the following reasons (38 F.C.C. 699, pars. 44-45):

(1) CATV cannot serve many persons reached by television broadcast signals because of the prohibitive costs of extending cable beyond heavily built-up areas. This means that people living outside heavily populated areas and those who cannot afford or do not wish to pay are entirely dependent upon local stations for television service. Primary reliance cannot therefore be placed on the CATV since it is a "service which, technically, cannot be made available to many others."

(2) Local stations serve as outlets for community self-expression, presenting programming designed to serve the needs and interests of local areas. Conversely, most CATV systems do not originate any local programming.

Having concluded that CATV serves the public interest "when it acts as a supplement rather than a substitute for off-the-air television service" (38 F.C.C. 701, par. 48), the Commission turned to the basic conditions under which competition between the CATV and the local television station occurs (38 F.C.C. 701-706, pars. 49-57 [2/]). It found that the competition was marked by features not present in the ordinary competition between broadcast stations, which were both unfair and inconsistent with the CATV's proper role as a supplementary service. The Commission noted that there has developed, under both the Communications Act and the antitrust laws, a reasonable amount of exclusivity on the exhibition of TV programs within the station's market and for a particular time period (38 F.C.C. 703, pars. 52-53). CATV, however, presently stands outside the established program distribution process and brings into a local station's area the programs of distant stations, irrespective of the reasonable exclusivity which the local station has bargained for in the competitive TV market. (38 F.C.C. 704, par. 54)

2/ The two compete because when a cable system brings to a station's market additional signals which would not be readily available in the system's absence, it introduces competition for audience attention--and audience attention is the basic commodity that a station sells to advertisers. 38 F.C.C. 702, par. 50.

In addition to the above considerations, the Commission considered the question of the impact of CATV competition on the development of television broadcasting service (38 F.C.C. 706-713, pars. 58-75). It analyzed the economic data which had been presented and took into account information which had been acquired in case to case adjudication (38 F.C.C. 708-711, pars. 64, 68-69). Noting the explosive growth of CATV and its changing nature (38 F.C.C. 709, par. 65), as well as the increasing penetration of television stations' service areas (38 F.C.C. 709-710, pars. 66-67), the Commission concluded that remedial action was warranted (38 F.C.C. 713-15, pars. 76-79).

It therefore adopted Section 21.712, 47 CFR 21.712, its carriage and nonduplication rules for microwave-served CATV systems.[3/] The need for such rules was reaffirmed in the Second Report and Order (2 F.C.C. 2d at 745-56, pars. 47-75) where the Commission broadened the scope of the regulations to include all CATV systems, finding them "essential to insure that CATV continues to perform its valuable supplementary role without unduly damaging or impeding the growth of television broadcast service" (2 F.C.C. 2d 746, par. 47).

The nonduplication rule provides that upon request by the local station a CATV must not duplicate programs broadcast by the local station during the same day. Thus it gives a

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3/ Section 74.1103 is the corresponding rule for non-microwave-served CATV systems. The two rules are identical in substance, and are hereafter referred to as the nonduplication rule. They are set forth in the Appendix for Petitioner at 89A-96A.

preference to carriage of local signals by the CATV over distant signals where the programming is the same. The rule, however, specifies a number of exceptions. Thus, nonduplication protection applies to "prime time" network programs (i.e., those presented by the network between 6 p.m. and 11 p.m.) only if such programs are presented by the local station entirely within what is locally considered to be "prime time". Furthermore, a local station is only entitled to nonduplication protection against "more distant duplicating signals, but not against signals of equal priority * * *." Finally, the CATV system need not delete reception of a network program if, in doing so, it would leave available for reception of subscribers, at any time, less than the programs of two networks, or would deprive them of color reception of the program.

QUESTIONS PRESENTED

Respondents believe that a threshold question presented by this appeal is:

Whether Section 405 of the Communications Act, 47 U.S.C. 405 bars review of petitioner's claims of error since they were not raised before the Commission.

If the Court should find that the issues raised by petitioner are properly before it, we believe the questions presented may be stated as follows:

Whether the Commission has the authority to require that CATV systems which are served by FCC-licensed microwave facilities must, in order to receive that service, afford nonduplication to local stations.

Whether the nonduplication provision is an unconstitutional restriction on free speech.

Whether the nonduplication rule is reasonably related to the public interest standard of the Communications Act.

Whether an evidentiary hearing was required on petitioner's request for a waiver of the rule.

ARGUMENT

I. SECTION 405 OF THE COMMUNICATIONS ACT PRECLUDES REVIEW OF CONTENTIONS NOT RAISED BEFORE THE COMMISSION. SINCE NONE OF PETITIONER'S ARGUMENTS WERE RAISED BELOW, THEY ARE NOT PROPERLY BEFORE THE COURT.

In its brief Great Falls has launched a wide ranging general attack on the validity of all the Commission's CATV regulations and on the Commission's jurisdiction to regulate CATV. Before the Commission it did not raise any of its present contentions. Instead it tried to justify a partial waiver of the non-duplication rule based upon alleged hardships which would result from strict application of the rule (R. 2-9; 15-26; 37-43). Great Falls is therefore precluded from raising these matters for the first time on appeal.

Section 405 of the Communications Act, 47 USC §405, unequivocally establishes that no "question of fact or law" may be raised on appeal which petitioner has not first raised before the Commission.[4/] See also United States v. Tucker Truck Lines, 344 U.S. 33 (1952); Unemployment Commission v. Aragon, 329 U.S. 143, 155 (1946); Albertson v. F.C.C., 243 F.2d 209 (C.A.D.C. 1957); Florida Gulfcoast Broadcasters v. F.C.C., 352 F.2d 726 (C.A.D.C. 1965).

4/ In pertinent part 47 U.S.C. 405 states:

> A petition for rehearing must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. . . . The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass.

In view of these authorities, it is clear beyond question that petitioner's claims with respect to the First Amendment (Br. pp. 44-49), the need for an evidentiary hearing (Br. pp. 49-63), and the alleged arbitrary nature of the rule are properly outside the scope of this appeal. The record below is silent on these points since they were not asserted by petitioner and there is therefore nothing for this Court to review. Indeed, even as to the question of the Commission's jurisdiction (Br. pp. 10-40), it has been held that 47 U.S.C. §405 requires as a condition precedent to judicial review that the matter be raised before the agency. Presque Isle TV Co., Inc. v. United States, 387 F.2d 502, 504-506 (C.A. 1, 1967).

In that case the First Circuit held that a claim that the Commission lacks jurisdiction to regulate CATV was not properly before it because it had not been expressly presented to the Commission. After reviewing the relevant authorities in considerable detail, the Court concluded:

> We hold that even though the question of statutory interpretation was, strictly, a jurisdictional matter, it was a question of law which petitioners were obliged to raise ab initio. We believe that section 405 calls for this result and that no constitutional principles or public policy require us to construe it otherwise. 387 F.2d at 506.

We respectfully submit that this reasoning is equally applicable here, and that petitioner's claim that the Commission has no jurisdiction over its system, like its other arguments, cannot be considered now.

The only question the Commission passed on in this case was whether a partial waiver of the non-duplication rule should be granted. The Commission held in essence that the circumstances offered in justification for a waiver, arising from the fact that the systems and the distant stations were located in different time zones, were among the very things which had led to the adoption of the rule. Thus, rather than affording grounds for a waiver, the time zone differential was a classic case for the application of the rule. 5/ This conclusion has not been challenged in this appeal.

The remaining sections of this brief deal seriatim with the issues presented by petitioner. They need be considered only if the Court is of the view that these issues are properly raised at this tim

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5/ At issue in the rule making was whether the non-duplication provision should apply for an extended period, e.g., 15 days before and after the local broadcast, to simultaneous broadcasts only, or to some intermediate period. The Commission concluded that the 15 day period would be too disruptive of listening habits but that simultaneous non-duplication would not protect stations confronted with a "time zone differential problem." By extending the non-duplication period over a whole day, however, the Commission found that the disruption would be minimized throughout the country as a whole, and at the same time such protection would be sufficient to "preclude a CATV system, which brings programs across either border of the mountain time zone, from duplicating most, if not all, of a local station's network programs an hour or two before or after they are presented locally." Second Report and Order, 2 F.C.C. 2d 725, 749 (1966).

II. THE COMMISSION HAS THE AUTHORITY TO REQUIRE PETITIONER'S CATV SYSTEM TO DELETE PROGRAMS BROUGHT IN FROM DISTANT STATIONS ON THE SAME DAY THAT THESE PROGRAMS ARE BEING CARRIED OVER LOCAL STATIONS.

Petitioner's argument that the Commission lacks the authority to impose a non-duplication requirement is twofold. It asserts (Br. pp. 27-43) that the Communications Act provides no basis for regulating CATV systems directly. And in a separate argument (Br. pp. 10-27) it contends that although its system received distant signals via Commission licensed microwave facilities, the Commission may not impose conditions on those licenses with respect to non-duplication because this is simply an attempt to accomplish indirectly what the statutory scheme prevents it from doing directly.

In Southwestern Cable Co. v. U. S., 378 F.2d 118, this Court held that the Commission's authority may be "exercised only against licensees or applicants." Since CATVs fall in neither category, the Court therefore set aside a Commission order limiting the expansion of CATV systems in San Diego pending a hearing before the agency. [6/] The Supreme Court granted the Government's petition for writ of certiorari and the case has been briefed and argued. The major issue is that of the Commission's jurisdiction over CATV systems

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6/ But see Buckeye Cablevision, Inc. v. F.C.C., 387 F.2d 220 (C.A.D.C. 1967), where it was held that CATV "as a form of wire communication which enlarges the signal range of licensee stations to the potential detriment of the entire regulatory scheme" is subject to Commission authority.

not served by microwave radio facilities, and it is anticipated that a decision will be forthcoming during this term of Court. A decision upholding the Commission's jurisdiction would be dispositive of the contentions raised by petitioner here. On the other hand a holding adverse to the Commission would not necessarily affect the agency's power to adopt rules applicable to the microwave radio services, including those upon which CATV systems such as petitioner's depend, since these were not within the scope of this Court's Southwestern decision. Accordingly in this brief we address ourselves only to petitioner's contention that it is beyond the Commission's authority to require microwave-fed CATV systems to afford non-duplication protection. 7/

In our view this question was squarely and properly decided in Carter Mountain Transmission Corp. v. F.C.C., 321 F.2d 359 (C.A.D.C. 1963), cert. den. 375 U.S. 951 (1963). That case involved an application by a microwave common carrier for permission to construct facilities that were to be used to bring distant television signals to CATV systems located in several Wyoming communities. The authorization sought was in all material respects the same as that required by petitioner's affiliated carrier here. On appeal it was argued that the Commission erred in considering the economic impact that a grant of the microwave application would have on the local

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7/ This requirement is specified in Section 21.712 of the Commission's rules, 47 C.F.R. 21.712. The rule is set forth in petitioner's Appendix, p. 86A-91A.

station by virtue of the new service the CATV systems would be in a position to provide. The Court ruled that the Commission's various communications responsibilities are not compartmentalized and that its decisions in one field must take into account its responsibilities in others. "It necessarily follows," the Court stated, "that in determining whether the authorization requested by appellant would be in the public interest the Commission was entitled -- if indeed it was not obliged -- to consider the use to which the facilities and frequencies requested were to be put, and to weigh that use as against other legally relevant factors, including the effect on existing local stations." 321 F.2d at 363. See also Idaho Microwave, Inc. v. F.C.C., 352 F.2d 729 (C.A.D.C. 1965).

The soundness of this holding is manifest. The Commission is charged by the Communications Act with regulation of common carriers and broadcast services in the overall public interest. Petitioner's argument (Br. 10-27) would negate the purpose of the Communications Act to achieve a comprehensive and coordinated regulation of all interstate communication by wire and radio through the Commission and to insure the "maximum benefits of radio to all the people of the United States." Sections 1, 307(b) of the Communications Act, 47 U.S.C. 151, 307(b); National Broadcasting Co. v. United States, 319 U.S. 190, 210-217; Federal Radio Commission v. Nelson Bros. Co., 289 U.S. 266, 279, 285.

A common carrier cannot construct a new facility or extend its existing facilities sua sponte or upon customer demand. The Communications Act gives the Commission jurisdiction of "every common carrier engaged in interstate or foreign communication by wire or radio," 47 U.S.C. §201. The Act also requires a license for all uses of radio, including its use for common carrier purposes, which can be obtained only upon a showing that the "public interest, convenience, and necessity" will be served 47 U.S.C. §301, §§307-310. In passing upon an application for a new broadcast authorization, the Commission must consider a resulting loss of existing broadcast service as a factor bearing upon the public interest. F.C.C. v. Sanders Bros. Radio Station, 309 U.S. 470, 475-476; Carroll Broadcasting Co. v. F.C.C., 258 F.2d 440, 443-444 (C.A.D.C.). Similarly, in the common carrier field, the competitive impact of a proposed facility upon existing common carrier service has been held to be a "relevant factor in weighing the public interest." F.C.C. v. R.C.A. Communications, Inc., 346 U.S. 86, 94.

Under the circumstances outlined in our counterstatement, pp. 1-3, supra, it was clearly proper for the Commission to consider the effect of the proposed common carrier operations upon the existing broadcast service in Great Falls, Montana. The relation of the two services is immediate and direct. Great Falls proposes to pick up signals broadcast by television stations in distant areas, transmit them by microwave to its CATV systems in the area served by local

television service, and thus deliver in practical effect competing television material. Following a comprehensive rulemaking proceeding the Commission concluded that unless some degree of protection, in the form of the non-duplication requirement, were established, the viability of local stations would be jeopardized to the detriment of the public interest in "the larger and more effective use of radio," 47 U.S.C. 303(g). See also 47 U.S.C. 301, 307(b). Though the rule it adopted may apply directly to the radio common carriers and only indirectly to the CATV system, it is not thereby rendered invalid. 8/

8/ Petitioner's argument (Br. 21-27) that the Commission exceeded its authority when it considered the use to be made of the proposed common carrier service cannot be distinguished in substance from the position unsuccessfully urged by the carrier in Federal Power Commission v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1. In Transcontinental the Supreme Court sustained the authority of the Power Commission to deny a certificate for the transportation of natural gas where the proposed end use--burning the gas under the purchaser's industrial boilers--was deemed inferior to other possible uses, although the Power Commission had no jurisdiction over direct sales for use by the purchaser. The authority of the Communications Commission to consider the proposed "end use" here would thus appear to be clearly established since, unlike the Natural Gas Act (see 365 U.S. at 8, 19), the Communications Act is intended to provide a comprehensive scheme of federal regulation of interstate communications. See Section 1, 47 U.S.C. §151. Community antenna television systems present an "end use" peculiarly related to television broadcasting. Clarksburg Publishing Co. v. F.C.C., 225 F.2d 511, 517 (C.A.D.C.).

III. THE NONDUPLICATION RULE DOES NOT UNCONSTITUTIONALLY RESTRICT PETITIONER'S RIGHT OF FREE SPEECH.

Great Falls argues (Br. 44-49) that the CATV rules infringe upon its right of free speech in contravention of the Communications Act, and the First Amendment of the Constitution. Its argument is premised on the ground that the nonduplication rule inhibits the distribution of Constitutionally protected material. We believe it is clear that no such violation exists. In National Broadcasting Co. v. United States, 319 U.S. 192 (1943), the Supreme Court made clear that reasonable regulation of the use of the radio spectrum in the interest of the general public is not a violation of the First Amendment. See also California Citizens Band Association v. United States, 375 F.2d 43, 55 (C.A. 9, 1967); Lafayette Radio Electronics Corp. v. United States, 345 F.2d 278 (C.A. 2, 1965). In NBC the Court concluded (319 U.S. at 227):

> * * * The right of free speech does not include however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

If, as we urge, the Commission has been granted the authority by Congress to limit the duplication of local television signals through the importation of distant signals, the NBC case, supra, makes clear that such a limitation raises no substantial free speech question. CATV systems constitute a part of the scheme of television distribution, which unlike other modes of expression, make use of

radio signals as a sine qua non of their operation. They in essence the CATV regulations, like the network rules at issue in the NBC case, are another aspect of regulation of the use of the airwaves.

The Commission's effort to preserve local television by regulating CATVs has the same constitutional status under the First Amendment as regulation of the transmission of signals by the originating television stations. The crucial consideration is that they use radio signals and that they have a unique impact upon, and relationship with, the television broadcast service. Indiscriminate CATV development, feeding upon the broadcast service, is capable of destroying large parts of it. The public interest in preventing such a development is manifest.

With respect to the regulations at issue here, the courts have consistently upheld its validity against challenges that First Amendment rights were being infringed. In the Carter Mountain case the court rejected the argument that nonduplication requirements constituted an improper restraint on free speech, stating that "protection of the public interest does not amount to 'censorship,'" 321 F.2d at 364. Similarly in Buckeye Cablevision Inc. v. F.C.C., 387 F.2d at 225, the court observed:

> It is true that CATV systems disseminate programs carrying a wide range of information. But we think the restraint imposed by the rules is not more than is reasonably required to effectuate the public interest requirements of the Act.

See also Idaho Microwave, Inc. v. F.C.C., 352 F.2d at 729, 733 (C.A.D.C.); and Conley Electronics Corporation v. F. C. C., __F2d__, decided April 22, 1968 (C.A. 10).

In sum, the regulation of the airwaves is an exercise of the commerce power. Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266, 279 (1933), and Congress may subject their use to reasonable regulation in the public interest, whether the use of radio signals be made by radio and television stations or by CATV systems. Such regulation which, as we have shown above, is reasonably related to valid objectives, is not an infringement upon the rights of free speech of either the CATV system operator or the viewing public.

IV. THE COMMISSION'S NONDUPLICATION RULE STRIKES A FAIR BALANCE BETWEEN COMPETING INTERESTS, AND PROTECTS THE PARAMOUNT PUBLIC INTEREST.

Petitioner challenges the wisdom of the nonduplication rule on the ground that it unfairly restricts competition between local television stations and CATV (Br. 63-78). This matter was, of course, fully considered in the rule making proceeding, where the Commission concluded that, on the contrary, the nonduplication rule corrects a competitive situation that is basically unfair. Thus, the Commission explained that local television stations like those in Great Falls

> . . . obtain their programs, for the most part, from various program suppliers. The most important of these, for most stations, are the national television networks. However, stations deal in addition with the distributors of feature film, cartoon, syndicated, and sports programming. The station obtains the right to exhibit network programs by offering to the network attractive

> audience circulation, etc., and by giving up to the network a major portion of the compensation which the sponsor or participating advertiser pays for the use of the station's facilities in connection with that program. The station normally obtains the right to exhibit nonnetwork programs by outright payments to nonnetwork program suppliers. 38 F.C.C. at 703, par. 52.

On the other hand, a CATV system, like petitioner's, is not faced with these expenses because it

> . . . presently stands outside of the program distribution process we have described. It has not been found subject to the requirements of section 325. [47 U.S.C. 325 forbids broadcast stations from rebroadcasting without consent programs of other stations. There is no such statutory restriction applicable to CATVs.] It does not compete for network affiliation, nor for access to syndicated programs, feature films, or sports events. It is not concerned with bidding against competing broadcasters for the right to exhibit those programs nor with bargaining with program suppliers for time and territorial exclusivity. 38 F.C.C. at 704, par. 54.

See also the Commission discussion in Second Report and Order, 2 F.C.C. 2d at 778, pars. 132-133.

An avowed purpose of the nonduplication rule is to redress this imbalance so as to enhance the ability of the local station to survive. We emphasize that contrary to petitioner's assertions, this is not a finding of unfair competition as that concept is embodied in the Federal Trade Commission Act. Nor does the rule purport to create property rights in programming or in any way to

implement the Copyright Act. See First Report, 38 F.C.C. at 740. Rather, it is a rule reflecting a policy designed to further the "public interest in the larger and more effective use of radio" (Section 303(g) of the Communications Act of 1934, as amended, 47 U.S.C. 303(g)), by integrating CATV into the nationwide television system in a fair and orderly manner--in a way which permits CATV to discharge its valuable function of bringing needed supplementary services, without being destructive of the more important local service and indeed of the parent broadcast service.

Nor is their substance to petitioner's claim that the rule is at odds with a national policy of free competition in the broadcast field. Indeed the case on which it chiefly relies makes clear that where competition may be harmful to the public interest, it is an element which the Commission must take into account. F.C.C. v. Sanders Bros Radio Station, 309 U.S. 470. Though petitioner quotes extensively from this opinion, it has seen fit to omit the following passage:

> This is not to say that the question of competition between a proposed station and one operating under an existing license is to be entirely disregarded by the Commission and, indeed, the Commission's practice shows that it does not disregard that question. It may have a vital and important bearing upon the ability of the applicant adequately to serve his public; it may indicate that both stations--the existing and the proposed--will go under, with the result that a portion of the listening public will be left without adequate service; it may indicate that, by a division of the field, both stations will be compelled to render inadequate service.

See also Carroll Broadcasting Co. v. F.C.C., 258 F.2d 440 (C.A.D.C. 1958). And in Carter Mountain, supra, the court held that the Commission was "fully warranted" in imposing nonduplication conditions on the CATVs. 9/

Finally, in a case identical to this one in all material respects, the Fourth Circuit upheld the nonduplication rule as "seemingly . . . a fair adjustment and accommodation of conflicting claims." Wheeling Antenna Co., Inc. v. U.S. and F.C.C., ___ F.2d ___. The following from that opinion is equally applicable to the case at bar:

> For its survival, of course, a station needs financial support. Commercial advertisements are a chief source and these are attracted by the number of a station's viewers, for they are the advertisers' prospective customers. Consequently, to insure its permanence a station is entitled to some protection against dilution of its coverage through CATV's introduction of the same programs from more removed stations. In weighing the hurt to CATV against the help to TV, there are several considerations besides the hope of preserving the station as a local and national asset. One is the fact that the local station is put to substantial expense in procuring programs, while CATV has so far been able to use them without sharing this burden.
>
> On balance, we cannot say the Commission has not been impartial in fulfilling its obligations. Neither the rules nor their administration are shown to be unjust, including the particular rule now in suit. Seemingly, it represents a fair adjustment and accommodation of conflicting claims to first place in the public interest. Cf. Channel 9 Syracuse, Inc. v. FCC, supra, 385 F2d 969, 971, and Carter Mountain Transmission Corp. v. FCC, supra, 321 F2d 359, 363, cert. den., 375 US 951. The Commission's order is an evenhanded and justified execution of this policy . . . (Footnote omitted.)

9/ In Conley Electronics, supra, the Court stated "Indeed, we think the rule is not only consistent with Sanders, but affirmatively implements it. . . We hold that the non-duplication rule was a reasonable exercise of the Commission's authority.

V. THE COMMISSION WAS NOT REQUIRED TO HOLD A HEARING ON PETITIONER'S REQUEST THAT IT BE EXEMPTED FROM THE NON-DUPLICATION RULE.

Petitioner argues (Br. 49-63) that the relevant statute and regulations, as well as due process required a hearing before its long standing business practices are modified.[10/] Dealing with precisely the same kind of claim the Fourth Circuit in the Wheeling case, supra, stated:

> At its option the Commission may, as it did here, adjudicate by reference to a pertinent general rule. Cf. Securities Comm'n v. Chenery Corp., 332 US 194, 203 (1947). In the present circumstances no hearing was demandable. FPC v. Texaco Inc., 377 US 33, 44 (1964); United States v. Storer Broadcasting Co., 351 US 192, 205 (1956). Otherwise, the Commission would be intolerably and impractically embroiled in a multiplicity of trials. This does not mean, of course, that a petitioner goes unheard. It means only that the Commission may make its judgment on the petitioner's papers. The decision then becomes reviewable in whatever manner the statute may permit.

And in Conley Electronics Corporation v. U. S., supra, the Tenth Circuit reached the same result under identical circumstances.

10/ The order in this case is not as petitioner suggests a revocation order under 47 U.S.C. 312. Pursuant to that section, the Commission may issue such orders to any person failing "to observe any rule or regulation of the Commission" authorized under the Act. They may be entered only after a hearing in which the person involved has been afforded an opportunity to show cause why the order should not be issued. And the proceedings are reviewable only in the Court of Appeals for the District of Columbia Circuit, 47 U.S.C. 402(b)(7).

Here the Commission's order simply denied a waiver of one of its rules applicable to all CATV systems. The nonduplication rule generally becomes operative when the local station requests program exclusivity protection from the CATV operator. However, upon receipt of this request, the CATV system may petition the Commission to waive the rule. A petition for waiver operates to stay compliance pending a determination of the merits of the waiver petition. Hence, the necessity for including a clause fixing the date for compliance in any order denying a petition for waiver.

This reasoning is supported not only by the Supreme Court cases cited, but also by the Court's opinion in California Citizens Band Association v. U.S., 375 F.2d 43, 51-52 (C.A. 9, 1967), cert. denied __ U.S. __. See also American Airlines v. Civil Aeronautics Board, 359 F.2d 624 (D.C. Cir., 1966), cert. denied, 385 U.S. 843; Airline Pilots Association, International v. Quesada, 276 F.2d 892 (C.A. 2, 1960). All of these authorities establish that where general rules are adopted, which apply to all coming within their terms, individual adjudicatory hearings are not required before the rules may become effective.

The justification for proceeding without a hearing is far stronger here than in any of the above cases. There appears to be no material facts in issue at all. The grounds asserted for a waiver, the choice of programs made possible by the time zone differential, far from being a reason to depart from the rule, is one of the very situations the rule was designed to meet. And finally no hearing was ever requested by the petitioner. The record below is thus devoid of any statement by the petitioner as to what it would show in such a proceeding.

In the Storer case, cited above, the Supreme Court observed: "We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing." 351 U.S. at 205. Clearly this is the case here.

CONCLUSION

For the reasons stated, the Commission's action should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Joseph A. Marino